

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 5723 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE R.BALIA.

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES
2. To be referred to the Reporter or not? : YES
3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
5. Whether it is to be circulated to the Civil Judge? : NO

B M MEHTA

Versus

STATE OF GUJARAT

Appearance:

MR PARESH UPADHYAY for Petitioner
MR SP HASURKAR for Respondent No. 1
MR ND GOHIL for Respondent No. 2, 3, 4

CORAM : MR.JUSTICE R.BALIA.

Date of decision: 18/10/1999

ORAL JUDGEMENT

1. This petition has been filed in the following circumstances.

The petitioner was appointed as Jr. Clerk in the office of Director of Social Welfare, Gujarat State on 1/9/79. He was promoted as Sr. Clerk on 15/1/85 and again promoted as Head Clerk on 2/4/90. The petitioner

passed the promotion qualifying examination for the post of Social Welfare Officer Class II on 21/5/94. This promotion qualifying examination for post of Social Welfare Officer is necessarily required to be passed under the District Social Welfare Officer and Nomadic Tribes Welfare Officer [Conditions of Service relating to Departmental Examination] Rules, 1970 [hereinafter referred to as the Rules of 1970]. Thus, the petitioner became eligible to be promoted to the post of Social Welfare Officer Class II having already passed the promotion qualifying examination. However, before he could be promoted on that basis, he was directly recruited in 1996 vide order dated 16/1/1996 as Social Welfare Officer Class II and was appointed on probation. Period of probation was two years.

3. Rule 3 required every appointee by direct recruitment after the commencement of Rules to pass relevant Departmental Examination after appointment, before he could be confirmed within prescribed attempts. First proviso to Rule 1[3] also envisaged exemption from passing Departmental Examination in certain circumstances.

4. On 19/2/97, the Government passed an order granting the petitioner exemption from appearing in the relevant Department Examination as per rules, in consultation with the General Administration Department. Thereafter, the petitioner was also confirmed by making order dated 18/3/98 on successfully completing the probation period on 15/1/98. Consequential pay fixation etc. were also made. However now, by impugned order dated 25/6/99, the order of the Government dated 19/2/97 by which the petitioner was exempted from appearing in the relevant Departmental examination was canceled.

5. The petitioner challenges that order on two fold grounds. Firstly, that the order is contrary to principles of natural justice having been passed without affording opportunity of hearing which not only affects adversely the petitioner in the matter of withdrawing exemption from taking the relevant Departmental Examination but also affects adversely the petitioner's confirmation on successfully completion of the probationary period. The another ground on which the same is challenged is that the impugned order is contrary to the rules on merit, because the petitioner having already passed the relevant departmental examination making him eligible to be considered for promotion to the post of social welfare officer Class II was entitled to exemption to pass this departmental examination, even

without any order to that effect, and at any rate, the order of exemption was in consonance with such Rules.

6. Learned counsel for the respondents while unable to dispute on facts that no opportunity of hearing was granted to the petitioner, has urged that his appointment order itself speak that the petitioner shall have to pass the departmental examination for that purpose. Since the recruitment itself was subject to passing of the examination, question of granting exemption does not arise. However, it was urged by the learned counsel for the petitioner that, if still court reaches to the conclusion that the opportunity of hearing is necessary to be granted, the petitioner may be granted post decisional hearing now.

7. Having heard learned counsel for the parties, I am of the opinion that both the contentions raised by the learned counsel for the petitioner deserve acceptance. So far as the order being in violation of the principle of natural justice, the undisputed facts do show such breach. That the order affects the petitioner adversely also cannot be disputed and denied inasmuch as the direct effect of the order is to deny the petitioner of his status as a confirmed social welfare officer Class II with effect from the date of his direct recruitment on successful completion of probation period, once he was not required to undergo departmental examination in view of the exemption granted to him and it also results in withdrawal of benefits that had accrued to the petitioner by subjecting now to take relevant departmental examination.

8. So far as the contention that the order is otherwise contrary to rules is also well founded. The rules of 1970 makes the rules applicable to all persons recruited in social welfare department as social welfare officers or nomadic tribes officers, deputy directors, assistant directors and house masters, backward class hostels, whether by promotion or otherwise. That is to say, the rules apply equally to the appointment by way of promotion or by way of direct recruitments or otherwise.

9. Rule 3 enjoins on every incumbent who has been appointed as direct recruit as social welfare officer prior to the coming into force of the rules, to pass the departmental examination within a period of 3 years from the date of appointment as a social welfare officer and every person who is being appointed as a direct recruit as a social welfare officer is required to pass the departmental examination within a period of two years

after the date of appointment.

10. Rule 5 makes it a condition precedent for making a candidate eligible for promotion to the post of social welfare officer that he shall have to pass the departmental examination within a period of 3 years either from the date of his completing 3 years service in the post and before he attains the age 40 years or within 3 years from the appointed date whichever is later. The conditions referring to the period and number of attempts within which an incumbent has to pass the departmental examination whether appointed by promotion or by direct recruitment, while lay down necessity of passing the departmental examination both for promotees as well as the direct recruits, after the appointed date on which the rules came into force, and makes part of eligibility condition for promotion that the incumbent has passed the departmental examination within the time prescribed and number of chances offered from the date of appointment on the post, before an incumbent becomes eligible to be promoted as social welfare officer. There being no chance of pre-appointment departmental examination in the case of direct recruits, such examination has to be passed after the recruitment takes place. With this scheme framework, the first proviso to sub-rule [3] of rule [1] clearly postulates in the following words :-

"Provided that where any such person has, before the appointed date passed the relevant examination or has been exempted from passing the relevant examination he shall not be required to pass the departmental examination."

12. Thus, a person who has otherwise passed the departmental examination before being appointed is not again to be subjected to pass the departmental examination after being appointed. Apart from this, it also envisages that the incumbent can be exempted from passing the relevant examination otherwise also in appropriated cases. This exemption does not make any distinction between appointment by promotion or by direct recruitment. It applies equally. In the case of a direct recruit, obviously it can only refer to Departmental Examination taken by a person awaiting promotion. In such cases where exemption flows from having passed relevant examination earlier, the exemption operates a priori vigore, by operation of rule.

13. In the present case, the petitioner had already

passed the departmental examination before being appointed making him eligible for the very same post by promotion. In case he would have been promoted, he would not have been required to take the departmental examination after being appointed by promotion. The Government has also in exercise of its authority granted exemption from taking the examination for the very same purpose in consultation with GAD after he has been directly recruited. He was on his own exempted from passing Departmental Examination. At any rate, keeping in view this aspect, the exemption granted to the petitioner vide order dated 19/2/97 was fully in consonance with proviso one to sub-rule [3] of Rule [1] of the rules of 1970 and could not have been withdrawn.

14. In view of the aforesaid conclusion, this petition succeeds. The impugned order dated 25/6/99 is quashed. Rule made absolute accordingly. There shall be no orders as to costs.

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